
**IN THE SUPREME COURT
OF THE
STATE OF VERMONT**

Docket No. 2019-226

**IN RE PETITION OF CHELSEA SOLAR LLC, PURSUANT TO
30 V.S.A. § 248, FOR A CERTIFICATE OF PUBLIC
GOOD AUTHORIZING THE INSTALLATION AND
OPERATION OF THE “WILLOW ROAD PROJECT,” A
2.0 MW SOLAR ELECTRIC GENERATION FACILITY
ON WILLOW ROAD IN BENNINGTON, VERMONT**

Appeal From:

Public Utility Commission
CASE NO. 17-5024-PET

**REPLY BRIEF OF APPELLANT
CHELSEA SOLAR LLC**

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Chelsea Solar LLC (“Chelsea”) files this reply brief responding to the arguments made by the Department of Public Service (the “Department”) and Intervenor the Apple Hill Homeowners Association, Maru Leon and David Griffin (the “Intervenor”).

ARGUMENT

I. The PUC’s Holding That the Chelsea Project Satisfied the Orderly Development Requirements of 30 V.S.A. §248(b)(1) Was Not Clearly Erroneous.

A. Whether or Not the Town Plan Contains A Clear Community Standard Is Irrelevant Under §248(b)(1).

Argument III of the Intervenor’s brief asserts that the “PUC’s conclusion that the Bennington Town Plan and associated documents do not contain a clear written community standard under §248(b)(1) and (5) was clearly erroneous and an abuse of discretion.”

Under §248(b)(1), whether the Project conforms with a “clear community standard” in the town plan is immaterial because that is not the standard. As Justice Robinson’s recent concurring opinion explained at length in *Rutland Renewable Energy, LLC*, 2016 VT 50 (“*Rutland*”) unlike Act 250, §248(b)(1) does not impose a conformance standard:

An Act 250 permit may not be issued unless the project is “in conformance with any duly adopted local or regional plan.” Yet the Legislature has not included in §248 any language suggesting that the Board must afford any deference to the Town’s recommendations, explain its departure from those recommendations, or ensure that the project conforms to the Town’s recommendations.

In fact, the permitting process pursuant to §248 preempts municipal zoning requirements altogether—an aspect of the statutory structure that further undermines any suggestion that the Board owes deference to the Town’s solar siting standards.

Rutland at ¶¶35-36 (citations omitted). *See also In re Vt. Elec. Power. Co.*, 2006 VT 69 § 25 (“this Court has construed the phrase ‘due consideration’ in § 248(b)(1) to ‘at least impliedly postulate[] that municipal enactments, in the specific area, are advisory rather than controlling’”) (internal citations omitted.)

The focus of the statutory requirement of §248(b)(1) “relates to the orderly development of the region, not to a particular municipality within the region.” *Id.*, ¶9 (emphasis added). There, as here, “[t]he main thrust of the arguments of the ... neighbors [was] that the [PUC] failed to give sufficient weight to the standards adopted by the Town legislative body.” *Id.* This Court rejected those arguments confirming that the legal standard relates to *regional* and not local impacts on orderly development. *Id.* There, as here, “[t]here was very little evidence of the project’s regional impacts; virtually all the evidence and arguments concerned the impacts on and within the Town.” *Id.* ¶12 (“[T]here was no actual evidence of regional impact.”) Because this Court found no demonstration of adverse regional impacts that would disrupt the PUC’s decision, it held that it would not reverse the ruling (even in light of a clear statement in the town plan to require solar setbacks that could not be achieved). *Id.* The same result is required here as the PUC’s Order concludes. There was no evidence of undue adverse regional impact and the Appellees have not claimed otherwise.

B. The Outcome Of This Case Is Not Dictated By *In Re Apple Hill Solar* Because The PUC Made Different Findings And Reviewed Different Evidence.

The crux of the Intervenor’s claim under §248(b)(1) is that commercial-scale solar projects, such as the Project, are not permitted in the rural conservation district (“RCON”) under the Town Plan. Here, as in *In re Apple Hill Solar LLC*, 2019 VT 64 (“*Apple Hill*”), the Intervenor’s assert that the PUC relied too heavily on the meaning of the Town’s withdrawal of opposition to the Project. At page 28 of their brief, the Intervenor’s point to two passages in the PUC’s Chelsea Order to support their claim. The first is the hearing officer’s statement: “I gave due consideration to the Town’s conclusion that the Project did not violate the Town Plan and thus did not violate a clear, written community standard.” PC16. The second is the Intervenor’s reference to PC18 where the hearing officer disagreed with the opinion of Mr. Raphael.

Both of those passages represent a small aspect of the PUC's discussion in this case on orderly development, and ignore the PUC's findings and other discussion, which are more than sufficient to justify the conclusion that the Project satisfied section 248(b)(1). The Intervenor's claim that those two quotes can upend every other finding and conclusion is misplaced for several reasons.

As it relates to the second passage relied on by the Intervenor, the PUC's primary basis for disagreeing with Mr. Raphael was his use of the incorrect legal standard, not his failure to consider the Town's withdrawal of opposition. As the hearing officer stated, Mr. Rafael "treats the language describing the Rural Conservation District of the Town Plan as embodying rigid standards that give the Town Plan a veto power over the Project." PC17. The hearing officer then properly noted that, as a result, the entire framework of Mr. Raphael's analysis was wrong, inconsistent with the statute, and inconsistent with this Court's precedent. PC17. Indeed, Mr. Raphael acknowledged that he was not familiar with this Court's controlling precedent. PC17-18.

Similarly, what the Intervenor refers to as improper criticism of Mr. Raphael for not taking into account the Town's withdrawal of opposition is taken wildly out of context. Mr. Raphael's entire premise for his contrary conclusion on orderly development was based upon "the opposition" generated by the Intervenor. Exhibit PSD-DR-2 at 28 ("Clearly the town's opposition, and that of neighbors to the Project(s) have informed this review.") *Id.* at 34. ("While the RCD does not preclude development, it is clear from the current town sentiment and efforts in changing the Town Plan that the community and the neighbors did not and do not envision a project such as this.") It was Mr. Raphael that placed the then opposition of a handful of residents, who pressured the Town to join them, as a relevant factor. The hearing officer was then right to raise it at the hearing when the Town had since withdrawn its opposition.

Moreover, the hearing officer was justified in rejecting Mr. Raphael's conclusion because Mr. Raphael failed to consider the fact that other similarly-situated projects were issued CPGs in the RCON, some of which the Town actively supported, and none of which the Town opposed. *See*, Sep. 20, 2018, Hearing Tr. 40:16-24:

Q. But you didn't consider ... the town's position with respect to other solar development in the rural conservation district and how that may impact the town's view as to orderly development? ... you don't think that's a relevant inquiry to see how other like projects have been -- have been considered by the town with respect to orderly development?

A. I mean it certainly could be considered. I don't know as if -- you know there may be some relevance.

Of course, there is relevance. Either the RCON permits commercial scale solar or it does not. There is no in-between. The center-point of the Intervenor's town plan argument is that the language of the town plan excludes commercial scale solar, such as the Project. That argument is recited by Mr. Raphael in the excerpt quoted by the PUC at PC17. The Intervenor's and Mr. Raphael's fundamental premise is that the RCON limits development to "very low density residential" uses, and commercial-scale solar is not that.

In the portion of his deposition in which he was speaking for the Town under Rule 30(b)(6), the town planner stated that commercial-scale solar such as the Project is permitted in the RCON and treated like any other use. APSC2, Monks Dep. 7:1-4. That ends the matter and with it the center-point of the Intervenor's and Mr. Raphael's objections. That statement of the Town is a change from the Town's prior opposition in PUC docket 8302 (Chelsea I) and squarely and properly fits within the hearing officer's characterization of "lack of Town opposition to this Project or the Town's own more expansive interpretation of its Town Plan's restrictions in the Rural Conservation District." PC18. Indeed, it would be error for the PUC to not have considered

the clear statement of the town planner (speaking for the Town at that point of his deposition) that commercial-scale solar like the Project is permitted and treated as any other use.

As to the passage that the hearing officer gave “due consideration to the Town’s conclusion that the Project did not violate the Town Plan and thus did not violate a clear, written community standard,” the hearing officer could properly have used that as shorthand for referring to the town planner’s statement that solar is allowed in the RCON and treated like any other use. The town planner’s statement was also corroborated by the Town Attorney’s statement at a public hearing when he stated it was simply not credible to take the position that commercial-scale solar in the RCON was excluded by the town plan. There is simply no basis to conclude the statement of the hearing officer is erroneous, much less clearly erroneous, or a basis to upend the PUC’s entire conclusion regarding orderly development.

Moreover, unlike *Apple Hill*, the PUC’s decision here with respect to the §248(b)(1) criterion is more expansive, focusing on numerous facts and conclusions unrelated to the Town’s withdrawal of its opposition to the Project. For example, the Chelsea Order related to §248(b)(1) includes additional findings that were not in *Apple Hill*, such as Findings 28, 33, 37, and these:

31. The Town Plan designates two scenic gateways in the vicinity of the Project. The first is the view of the Bennington Battle Monument and Mt. Anthony directly visible while traveling south on Route 7 near the Project site. This long-range gateway view will not include the Project, which is located above and to the left of Route 7 while traveling south. The second scenic gateway is located 0.75 mile from the Project site along VT Route 279 west of its interchange with Route 67. This scenic gateway includes long-range views of the Green Mountains to the east and will not include the Project site. Exhs. CS-MB-2 at 9, PSD-DR-2 at 7- 8, and CS-MK-2 at 9.

35. The Regional Plan also has an energy policy with ten goals. Among others, these goals include: (1) assuring a safe and reliable supply of energy to meet reasonable consumer demands; (2) decreasing reliance on non-local energy sources; (3) making energy choices that maintain or improve environmental quality; (4) encouraging the development of renewable energy resources; and (5) assuring diversity in energy sources. Exh. CS-BW-79 at 65.

36. The Bennington Regional Energy Plan (2009) encourages both residential and commercial renewable energy using photovoltaic arrays to convert solar energy to electricity. Exh. CS-BW-80 at 34, 36, 51, and 52.

Finding 31 (which has nothing to do with the Town's non-opposition) is dispositive of the orderly development criteria. The project site is not part of any area of special importance. Therefore, no standard is violated under the *Quechee* test. *In re Petition of Rutland Renewable Energy, LLC*, Case No. 8188, Order of 5/6/15 at 7, quoting *In re Halnon*, NM-25, Order of 3/15/01 at 23-24 ("the Environmental Board's intent behind adopting the clear, written community standard test in its *Quechee* decision" was to identify "scenic resources that the community considered to be of special importance: a wooded shoreline, a high ridge, or a scenic back road...")

Moreover, unlike *Apple Hill* there is no statement in the Chelsea Order that the PUC "heavily relied" on the Town's withdrawal of its opposition. To the contrary, the additional findings and discussion in the Chelsea Order refute that conclusion. Moreover, the PUC acknowledged the Intervenor's claim that the Town's withdrawal of opposition may have been related to "undue financial distress" or other reasons. The PUC acknowledged that while it was "troubled by the possibility that financial pressure may have played a role in the settlement agreement," that did not require the PUC to provide it no weight, but rather "due consideration called for in Section 248(b)(1)." PC79-80.

The PUC's orderly development discussion stated only a single finding regarding the selectboard's position, finding 32, which finding accurately stated that "The Town of Bennington has determined 'not to oppose' the Willow Road Project." In contrast, the PUC enumerated at least 38 separate findings—24-31, 33-37, 86-104, 106-111—that summarize an extensive body of evidence that support the PUC's conclusion of no undue interference with orderly development of the region. PC14-16, 34-38. Moreover, the Town's own resident expert, Assistant Town Manager

and Planning Director Daniel Monks, reviewed eleven (11) different visual simulations of the Chelsea project with the Apple Hill project and gave his personal opinion that the Chelsea Project would not violate anything in the Town Plan. PC348-351, PC353-363. There is ample record support for the PUC's findings with respect to §248(b)(1).

C. An Ambiguous Town Plan Is Not A Land Conservation Measure.

The issue under §248(b)(1) as framed by the Intervenor is that the town plan's RCON zoning district's land use goals are a land conservation measure. The RCON goals are not a land conservation measure under §248(b)(1) because they are ambiguous and are not enforceable. Thus, whatever import should or should not be given to the Town's withdrawal of opposition is simply irrelevant, as the town plan has no bearing under §248(b)(1).

The issues advanced by the project's challengers in *In Re Chaves A250 Permit*, 2014 VT 5 ("*Chaves*") were remarkably similar to that advanced here, and rejected by this Court in *Chaves*. The challengers cited "the purpose of the rural residential-3 district, where the project [was] located, [was] to 'provide for agriculture, forestry, *low-density residential development* and other compatible land uses in a manner that maintains the Town's rural character, scenic landscape and natural resources.'" *Chaves*, ¶40. (emphasis added.). That is exactly the same argument used here with respect to the RCON district. This Court rejected the challengers attempt to equate the town plan with the status of an unambiguous, clear and unqualified community standard because it "contain[ed] no specific requirements that [were] legally enforceable." *Id.* ¶41. *See also, Regan v. Pomerleau*, 2014 VT 99, ¶16 (rejecting claims based upon the town plan because they were not "*mandatory and set[] forth no specific enforceable standards.*"). The Court also cited *JAM Golf*, ¶¶13-14, which held that ordinances that required design to "'protect' natural resources was unconstitutionally vague because it created no real standard."

This Court in *Chaves* also faulted the challengers for not recognizing that the town and regional plans expressed other goals, thus ambiguity was *by definition* created. This Court held that the town plan’s language did “not express unambiguous standards in that *both the town and regional plans* also express other goals.” *Id.*, ¶42. (emphasis added.) Specifically, this Court noted that the town plan recognized the importance of the project’s proposed operations. *Id.* That is also the case here. A “standard” that is in reality not a standard at all is not entitled to any consideration in a section 248 proceeding, much less due consideration.

II. The PUC’s Finding That The Chelsea Project Would Not Cause An Undue Adverse Effect On Aesthetics under 30 V.S.A. §248(b)(5) Was Not Clearly Erroneous.

A. The Modified Version Of The *Quechee* Test Applied Under Section 248 Excludes Adherence To The “Violates A Clear Community Standard” Prong Of The Test.

The modified version of the *Quechee* test applied under section 248 excludes the “violates a clear community standard” prong of the test. This is because “the permitting process pursuant to § 248 preempts municipal zoning requirements altogether.” *Rutland*, ¶36 (Robinson, J., concurring) (explaining that this is “an aspect of the statutory structure that further undermines any suggestion that the [PUC] owes deference to the Town’s solar siting standards,” citing *City of S. Burlington v. Vt. Elec. Power Co.*, 133 Vt. 438, 447-48 (1975)). As a result, and as this Court explained in *Rutland*, inquiry into whether a solar facility violates a town plan provision simply has no bearing on the outcome:

The Board’s holding is a modification of the *Quechee* test because the test was created for Act 250 review, and such review does not generally supplant local zoning regulation. *The Town and neighbors argue that the solar siting standards are “clear written community standards” by any definition of those terms. We might adopt that view if we were dealing with Act 250, where state and local regulatory review coexist. Here, we are dealing with a situation where, under existing law, municipalities have a different role. The effect of the solar siting standards under the theory of the Town and neighbors is to enable the Town to control solar generation siting through the Quechee test.*

Rutland, ¶18 (emphasis added).

The “different role” of municipalities that the Court refers to is one of their respective town plans being preempted from controlling if, and where, solar generation facilities are sited. This is based upon long-standing legal precedent. *See City of S. Burlington, supra*. Even if the Project were found to violate a clear community standard for the RCON, such a purported violation is not a permissible legal basis for denying the CPG and is not an appropriate basis for remand. To hold otherwise would be “to enable a town to control solar generation siting through the *Quechee* test.” *Rutland*, ¶18.¹

B. The RCON Policy Guidelines Are Not Clear Written Unambiguous Community Standards As A Matter Of Law.

This Court’s holdings in *Chaves* and *JAM Golf* are controlling because on its face, the RCON standards do not contain any real standards or specific requirements that are *legally enforceable*. Moreover, “the Environmental Board’s intent behind adopting the clear, written community standard test in its *Quechee* decision” was to identify “scenic resources that the community considered to be of special importance: a wooded shoreline, a high ridge, or a scenic back road.... ”² That is not what Bennington has done in the case of the RCON district, which comprises over 50% of the town. But crucially here, the PUC expressly found that the Town Plan did not designate the Project site as an area of special importance. PC15, 36, Findings 31, 104.

¹ The *Quechee* test in §248 proceedings is also modified because the PUC’s determination “is significantly informed by the overall societal benefits of the project.” *Joint Petition of Green Mountain Power Corp.*, Docket No. 7628, Order of 5/31/2011 at 83 (finding that that the Kingdom Community Wind project would not have an undue adverse effect on aesthetics because it helped to meet Vermont’s renewable energy goals and would aid the “reduction in global climate change caused by CO2 emissions,” notwithstanding that the Project might be deemed shocking and offensive from certain views. *Id.* at 88, 188.)

² *In re Petition of Rutland Renewable Energy, LLC*, Case No. 8188, Order of 5/6/15 at 7, quoting *In re Halnon*, NM-25, Order of 3/15/01 at 23-24.

1. Commercial-Scale Solar Projects Are Allowed In The RCON.

For the reasons set discussed in section I.B of this brief, commercial ground-mounted solar facilities are permitted in the RCON zone. Thus, the center-point of the Intervenor's argument is without merit.

2. The RCON Standard Related To Hillside Is Ambiguous.

When development on hillsides is to be restricted, clear standards must be set, and that must begin with defining hillside. *See, In Re Kiesel*, 172 Vt. 124, 130 (2000). This Court has held that a town plan restriction on construction on hillsides constituted a clear, written community standard only when a specific objective criterion regarding slope measurement was provided. *See, In Re Green Peak Estates*, 154 Vt. 363, 368 (1990) (enforcing specific standard prohibiting development on slopes in excess of 20 percent). Here there is no objective standard to guide enforcement, which the Town conceded. ASPC2, Monks Dep. 7:5-9.

But even if the standard was enforceable, the record evidence establishes the Project will not be prominently visible on a hillside. The determination of prominent visibility on a hillside or ridgeline is viewed from the base of the hill looking up. ASPC2, Monks Dep. 7:22-25, 8:1-7. Here it is undisputed that the Project is fully screened from all such vantage points. Findings 96-97, 102-103, 110-111 [PC35, 36, 38]. The town planner also agreed the Project was not prominently visible. PC348-351 (reviewing 11 visual simulations).

3. The "Minimize Clearing" Standard Is Ambiguous.

The RCON guideline that development "must minimize clearing of natural vegetation" is on its face vague as there is no clear guidance as to what the requirements are. *See, In Re Kiesel*, 172 VT at 130. The language is akin to town plan language regarding "minimizing impacts" that this Court has held to be legally unenforceable. In *Chaves*, the neighbors argued that the regional

and town plans used mandatory language regarding “minimizing impacts” on historical sites. This Court held that the language was broad and nonregulatory, espousing general policies about maintaining features, protecting valuable areas, and minimizing impacts, but contained no specific requirements that were legally enforceable. *See Chaves*, ¶12. That is true here as well. There is no objective standard. But even if the standard applied, the record evidence establishes that the clearing for the Project has been minimized, and clearing for the Project is consistent with similarly-situated projects in the RCON. Finding 100, PC35.

4. The Materials Standard Is Not A Clear, Community Standard.

Although the record evidence and finding 101 [PC36] establish that earth tone colors and non-reflective materials would be used and no party disputed that fact, the color and material standard has no real standards or specific requirements that are *legally enforceable* to guide enforcement.

5. Under *Chaves*, The RCON Purported Design Standards Are Not Clear, Unambiguous Written Community Standards For Another Independent Reason—Other Express Goals In The Town And Regional Plans Support The Project.

This Court in *Chaves* faulted the challengers for not recognizing that the town and regional plans expressed other goals, thus ambiguity was *by definition* created. This Court held that the town plan’s language did “not express unambiguous standards in that *both the town and regional plans* also express other goals.” *Id.*, ¶42. (emphasis added.) Specifically, this Court noted that the town plan recognized the importance of the project’s proposed operations. *Id.* That is also the case here.

The Town Plan includes various statements and goals promoting local distributed solar resources, such as the Project. *See* Finding 29 [PC15]. Moreover, the Town energy plan describes various goals encouraging solar resources, such as the Project. Indeed, municipal plans must

“encourage the development of renewable resources.” 24 V.S.A. §4302(a). Similarly, the Bennington regional plan describes various goals which recognize the importance of solar energy resources, such as the Project. *See* Findings 35-36. [PC16]. All those goals support the Project and, as this Court stated in *Chaves*, render the Town Plan ambiguous. That ambiguity simply prevents a conclusion that the PUC did not provide due consideration of the Town Plan. An ambiguous Town Plan, such as at issue here, provides no guidance and is not a factor that can be advanced in a section 248 process.

III. Any Error Made By The PUC Regarding Section 248(b)(1) And (b)(5) Was Harmless Error.

There are two other basic legal principles that support the Court affirming the PUC’s conclusions related to orderly development and aesthetics—harmless error and that the Court may affirm a decision despite improper rationale if the correct result was reached. *Sorge v. State*, 171 Vt. 171, 174, n* (2000); *Alpine Haven Prop. Owners Ass’n v. Deptula*, 2003 VT 51 ¶10, citing *Dicks v. Jensen*, 172 Vt. 43, 49 (2001) (affirming summary judgment on alternate grounds); *In re Wildlife Wonderland*, 133 Vt. 507 (1975) (Environmental Board’s consideration of improper matters was not grounds for reversal where board’s decision was amply supported on other grounds); *In re Adelphia Bus. Solutions of Vt., Inc.*, 2004 VT 82, ¶9 (“the error was harmless and does not warrant reversal of the PSB’s order.”); *Green Mountain Marble Co. v. State Highway Bd.*, 130 Vt. 455, 468 (1972) (“It is a well established rule that the party who alleges error has the burden of showing that he has been prejudiced thereby. Otherwise it is presumed to be harmless, if it is error at all.” (quotation omitted.))

Substantial evidence supports the PUC’s conclusions. Even if “the findings are not a paragon of completeness and clarity, [] it is the *duty of this Court to look for all reasonable inferences to support the result reached if it can reasonably do so.*” *Timney v. Worden*, 138 Vt.

444, 445 (1980) (emphasis added). As a result, the PUC’s decision should be affirmed on the issues of orderly development and aesthetics.

Moreover, as the Chelsea Order states: “the Commission’s consideration of aesthetics under Section 248 is ‘significantly’ informed by the overall societal benefits of the project.” PC41. Here, as explained *infra*, it is urgent that projects, such as the Chelsea Project, be put into service as quickly as possible because of their societal benefits.

IV. The PUC’s Conclusion Regarding Plant Capacity Was Clearly Erroneous.

The arguments made by the Intervenors regarding single plant (which continue to rely on false stories, *ad hominem* attacks and irrelevant facts) have been fully rebuffed by the arguments in Chelsea’s opening brief and the Department’s brief, which do not need to be repeated here. Indeed, the Intervenors go as far as mischaracterizing the basis on which the PUC made its conclusion by stating that the PUC’s decision was made in part because the projects share access off of Willow Road. [Intervenors Brief at 3]. The PUC specifically did not reach that issue. PC 77.³

The PUC’s clearly erroneous conclusion regarding “plant” was based upon a made up “but for” test: “but for the Willow Road and Apple Hill facilities, the GMP Line Extension would not exist.” PC 75. Not only is that not the applicable test as both Chelsea and the Department have argued, it is not even a factual statement. The GMP Line Extension was going to be built for one

³ If the projects “share” Willow Road, they also “share” every other road in Vermont (and elsewhere) that a person driving to the project uses. If they “share” the GMP Line Extension then they also “share” the utility line to the local substation, the local substation itself and every other piece of grid infrastructure in Vermont (and elsewhere). If a public road is or a utility-owned line can be “shared” infrastructure, then every solar facility in Vermont shares infrastructure, rendering superfluous the words in the statute.

of the two projects regardless of whether both projects were ultimately constructed. “As mentioned in the Executive Summary, a new three phase distribution line along Hewitt Drive is required for the interconnection of *either* or both project(s).” PC159 (emphasis added). The PUC’s “but for” conclusion, which is the linchpin of its single plant argument, is a clear error and the analysis on appeal should end there.

Worse, as the Department points out, the PUC is acting contrary to the interests of the State of Vermont. As a sovereign trustee, the PUC has a duty to refrain from actions which further impair our country’s life-sustaining and property sustaining climate system, which encompasses our atmosphere, waters, oceans, and biosphere. The PUC’s new crusade against independent, but proximate, solar projects aids and abets the tobacco-style marketing disinformation and misinformation campaign run for decades by the fossil fuel companies and their allies. At the end of the day, the PUC’s actions against Chelsea and its affiliates harm the health, safety and welfare of the people of Vermont.

V. There Are No Standards Defining “Project”.

The Department challenges Chelsea’s contention that the term “project” in the definition of plant is invalid. While it may not be necessary for this Court to reach the constitutional issue, in order to put this issue into real-world perspective, Chelsea has listed a side-by-side comparison of the PUC’s factors to illustrate that they are both standard-less and devoid of indicating anything relevant.

The PUC treated Chelsea as one entity—the “developer” (*i.e.*, “Allco”)—with every other entity related by direct or indirect ownership, and even reaching to the shareholder level. So let’s take a real world example. In 2019, Allco completed construction of the Battle Creek Solar 2.2MW project in Bennington, Vermont. At the same time, Allco was constructing multiple

projects in Connecticut, including one in Somers, Connecticut. Both the Battle Creek and Connecticut projects have in common almost all of the factors used by the PUC. Yet it would be absurd to consider a project in Somers, Connecticut, as the same “project” as a project in Bennington, Vermont.

A Comparison of the Developer’s Connecticut (Somers, CT) and Vermont (Bennington, VT) Projects Constructed Generally At the Same Time		
PUC “Same Project” Factors	Do the Somers CT and Bennington VT projects satisfy this criterion?	Rationale
“Project” = “a plan or proposal; a scheme” or “an undertaking requiring a concerted effort.”	YES	The developer had “an undertaking requiring a concerted effort” which was building these projects during the same time period. As part of that concerted effort common elements were used wherever practicable, and common contractors were used.
Common legal counsel?	YES	
Common owner of the land?	YES	
Common owner of the project?	YES*	
Common developer?	YES*	
Contiguity of time of construction?	YES	
Common ground lessee?	YES*	
Proximity?	NO	
		* Yes, under the PUC’s grouping of all related parties as one

What this comparison makes clear is that common ownership and contiguity of time of construction mean nothing in terms of whether solar facilities are separate projects. Only proximity is remotely relevant, and even with that factor there is no standard. A developer has no idea—none—as to what the criteria is. Sometimes the PUC uses the “puzzle” test. Sometimes it uses an “ordinary observer” test. Sometimes it looks to something else. No one knows what the standard is because there is none.

Restrictions on development of real property “are in derogation of the common law.” *In re Willey*, 120 Vt. 359, 365 (1958). Such restrictions must be strictly construed. *Id.* A “grant of flexibility to the [agency] is constitutional *only if it is accompanied by some ability of landowners to predict how discretion will be exercised and to develop proposed land uses accordingly.* Flexibility cannot be a synonym for ad-hoc decision making that is essentially arbitrary.” *In re Handy*, 171 Vt. 336, 349 (2000) (emphasis added). *Vermont Home Mortg. Credit Agency v. Montpelier Nat. Bank*, 128 Vt. 272, 278 (1970) (“the statute must establish reasonable standards to govern the achievement of its purpose and the execution of the power which it confers.”).

The term “project” in the definition of plant, and the PUC’s incorporation of the use of “proximity,” fails the constitutional test that a restriction on development is valid “*only if it is accompanied by some ability of landowners to predict how discretion will be exercised and to develop proposed land uses accordingly.*” Here, no one knows what project or proximity mean as a factor or how it should be applied. While the PUC might be constitutionally able to issue rules (subject the Vermont Administrative Procedure Act) adding meat to the bones, the PUC has not done so. Thus, there is absolutely no “ability of landowners to predict how discretion will be exercised and to develop proposed land uses.”

VI. The PUC’s Grant Of Intervention Was Clearly Erroneous.

The question of standing is a threshold issue determined when the intervenors applied for intervention. Whatever evidence the Intervenor may have presented during the PUC proceedings is not relevant to whether the PUC’s grant of intervention was proper. As the record shows, the Intervenor’s petitions to intervene were devoid of any evidence showing a substantial and particularized legally protectable interest that might be injured. Similarly, the PUC’s orders

granting intervention do not find that either Intervenor had a substantial and particularized interest. PC85, PC91.

Moreover, the evidence that was presented in the proceedings by the Intervenors, which is contained in the Intervenors' printed case, is also devoid of any evidence showing a substantial and particularized legally protectable interest that might be injured. The Intervenors' testimony merely expresses their concerns without providing any evidence. The grant of intervention to Leon/Griffin and the AHHA was clear error.

CONCLUSION

The choice in this case is straightforward. It is a choice between protecting the environment for our grandchildren and their grandchildren, or aiding the destruction of the environment by the fossil fuel industry and their allies. Last week a new report by 11,258 scientists in 153 countries from a broad range of disciplines warned that the planet "clearly and unequivocally faces a climate emergency."⁴ But that is not new news. The planet is on fire. Now in California, Californians face the choice of living without electricity on the one hand, or dying or having their homes burned down on the other. California's utilities are either in bankruptcy or one wildfire away. California is giving us a preview of the devastation that climate change will bring.

Vermont's most-recent assessment of Vermont's greenhouse gas inventory concludes that not only is Vermont woefully behind in its renewable energy goals (which themselves are inadequate), but it has been going backwards, with total CO2 emissions rising.⁵

⁴ "More than 11,000 scientists from around the world declare a 'climate emergency.'" Washington Post, November 5, 2019, <https://www.washingtonpost.com/science/2019/11/05/more-than-scientists-around-world-declare-climate-emergency/>.

⁵ "In Vermont, a progressive haven, emissions spike forces officials to consider drastic action," Boston Globe, January 28, 2019 ("goals, set by lawmakers in 2005, were significantly more

Last fall, the U.S. Administration released the complete *Fourth National Climate Assessment* (the “Climate Report”).⁶ The Climate Report provides overwhelming evidence proving that the continued use of fossil fuels endangers the public health, safety and welfare of Vermont and the Northeastern United States. Climate Report, Vol. II, Ch. 18, at 117.

In the April 10, 2019 edition of the Boston Globe, Bill McKibben, the Schumann Distinguished Scholar at Middlebury College, wrote:

The basic stability of our planet has been upended in our lifetimes. Unless we act quickly, the changes we’ve seen so far will be mild by comparison with what comes next. Science ... makes clear that without an emergency transition away from coal and gas and oil, we can expect such rapid shifts that our ability to maintain civilizations will be in doubt... Unless we goose the pace with government action, the world that we some day power with clean energy would be a dirty world, a broken planet.⁷

The PUC’s actions directed against Chelsea are fundamentally at odds with the urgent need for the world to transition its energy systems away from fossil fuels, and as the pre-eminent jurist, Judge Alfred Goodwin (a Republican appointee) wrote four years ago, are part of the wholesale failure of the legal system to protect humanity. Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 Wis. L. Rev. 785, 785-86, 788 (2015) (“The third branch can, and should, take another long

aggressive and made before similar pledges in Massachusetts and other states. But 14 years later, the zeal in the Green Mountain State has yielded not so much cleaner air, but embarrassment.”) <https://www.bostonglobe.com/metro/2019/01/28/vermont-perhaps-nation-most-progressive-state-spike-emissions-forces-officials-consider-drastic-action/10lUjXlilrkXyyz7uRwLMJ/story.html>

⁶ See, <https://nca2018.globalchange.gov/>, USGCRP, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA. doi:10.7930/NCA4.2018.

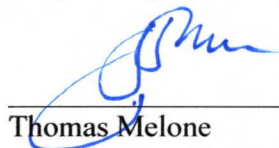
⁷<https://www.bostonglobe.com/opinion/2019/04/10/the-clock-keeps-ticking-fight-save-planet/R8ZrHbh2yFqA8bNXe6wdjJ/story.html>.

and careful look at the barriers to litigation created by ... deference to the legislative and administrative branches of government.”)

Delays of projects, such as Chelsea Solar, simply aid the continued destruction of environment by the fossil fuel industry and their allies, and betray our fundamental obligations to our grandchildren and future generations.

For the reasons set forth above and in Appellant’s opening brief, Chelsea Solar requests that this Court reverse the June 12, 2019 Order’s denial of the CPG and its ruling regarding single plant, order the PUC to issue a CPG for the Chelsea Project, and vacate the PUC’s grant of intervention to the Intervenors.

Respectfully submitted,



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Dated: November 26, 2019

Certificate of compliance with V.R.A.P. 32(a)(7)(D)

I hereby certify that this brief complies with the word-count limit of V.R.A.P. 32(a)(7). According to the word count of the Microsoft Word processing software the brief is 5,980 words.



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